Bala Murugan a/l Manarsamay dan lain-lain lwn Pendakwa Raya

MAHKAMAH TINGGI (TEMERLOH) — RAYUAN JENAYAH NO CB-41(Ors)-1–06 TAHUN 2023
ROSLAN MAT NOOR H
7 MEI 2024

Prosedur Jenayah — Rayuan — Rayuan terhadap perintah pelepasan tidak terjumlah kepada satu pembebasan — Perayu-perayu dituduh di bawah s 379 Kanun Keseksaan — Timbalan pendakwa raya membuat permohonan di bawah s 254 Kanun Tatacara Jenayah — Majistret memberikan perintah pelepasan tidak terjumlah kepada satu pembebasan ('DNAA') — Sama ada majistret telah menggunakan budi bicara yang betul dalam mempertimbangkan perintah DNAA — Sama ada mahkamah di peringkat rayuan perlu campur tangan dalam penggunaan budi bicara majistret — Kanun Keseksaan s 379 — Kanun Tatacara Jenayah ss 254 & 376 — Perlembagaan Persekutuan, perkara 145(3)

Perayu-perayu telah dituduh di bawah s 379 Kanun Keseksaan ('KK'), namun, setelah saksi pertama pihak pendakwaan selesai memberikan keterangan, timbalan pendakwa raya ('TPR') telah memohon kepada mahkamah majistret di bawah s 254 Kanun Tatacara Jenayah ('KTJ') agar perayu-perayu diberikan pelepasan tidak terjumlah kepada satu pembebasan ('DNAA') atas alasan untuk kajian semula kes ini rentetan daripada keterangan yang telah dibangkitkan dalam kes ini. Peguam perayu-perayu pula memohon supaya perayu-perayu dilepaskan yang membawa kepada pembebasan ('A&D') atas alasan bahawa salah seorang daripada mereka merupakan pelajar di institusi pengajian tinggi. Majistret telah memerintahkan supaya perayu-perayu diberikan DNAA, oleh itu, rayuan semasa. Persoalan-persoalan yang timbul dalam rayuan ini adalah: (a) sama ada majistret telah menggunakan budi bicara yang betul dalam mempertimbangkan perintah DNAA dalam kes ini; dan (b) sama ada mahkamah dalam rayuan semasa perlu campur tangan dalam penggunaan budi bicara majistret.

Diputuskan, menolak rayuan perayu-perayu:

(1) Pendekatan yang boleh dipertimbangkan oleh mahkamah ketika TPR memohon untuk menangguhkan prosiding di bawah s 254 KTJ adalah seperti berikut: (a) apabila permohonan tersebut dibuat, mahkamah harus mempertimbangkan terlebih dahulu untuk memberikan perintah DNAA; (b) setelah meneliti maklumat yang diberikan oleh TPR berkenaan permohonan penangguhan dan mahkamah berpendapat tiada apa-apa petanda bahawa kes tersebut boleh diteruskan semula

A disebabkan saksi utama telah meninggal dunia, tertuduh telah meninggal dunia atau saksi-saksi utama tidak dapat ditemui maka mahkamah boleh mempertimbangkan untuk satu perintah A&D. Sekiranya tempoh perbicaraan yang dijalankan telah mengambil masa yang lama dan memprejudiskan tertuduh maka perintah A&D boleh dipertimbangkan; B (c) mahkamah juga perlu menimbangkan adakah dengan memberikan perintah DNAA ia adalah suatu penindasan kepada tertuduh; (d) mahkamah juga perlu menimbangkan adakah tindakan memberikan DNAA tersebut adalah berasaskan kepada penyalahgunaan proses mahkamah; dan (e) mahkamah juga perlu menimbangkan adakah C pemberian DNAA tersebut bercanggah dengan kepentingan awam. Jika dapatan (c), (d) dan (e) tersebut adalah positif maka mahkamah boleh menimbangkan perintah A&D (lihat perenggan 36).

(2) Ini bermakna semasa mahkamah mempertimbangkan untuk D memberikan perintah DNAA atau A&D, ia tidak boleh dibuat sambil lewa. Mahkamah perlu mempertimbangkan garis panduan di atas sebagai asas kepada keputusan untuk membuat perintah yang sewajarnya. Pada masa yang sama mahkamah juga perlu mempertimbangkan bidang kuasa pendakwa raya yang telah E diperuntukkan di bawah perkara 145(3) Perlembagaan Persekutuan dan s 376 KTJ (lihat perenggan 37).

(3) Apa yang jelas daripada nota keterangan ialah pihak pendakwaan memaklumkan bahawa kajian semula akan dibuat ekoran daripada keterangan yang telah diberikan dalam kes ini. Ia mencadangkan bahawa F tindakan lanjut akan diambil ekoran daripada keterangan saksi yang telah dikemukakan di mahkamah. Ia mungkin membawa natijah bahawa pendakwaan akan diteruskan terhadap perayu-perayu atau tidak akan diteruskan. Ia adalah di dalam wewenang pendakwa raya. Nota G keterangan tidak menunjukkan bahawa siasatan telah lengkap bagi kes ini dan pihak pendakwaan tidak akan meneruskan pendakwaan kepada perayu-perayu. Dalam erti kata lain pihak pendakwaan masih mempunyai hasrat untuk meneruskan pendakwaan berdasarkan kepada hasil kajian yang akan dilakukan oleh pihak pendakwaan (lihat H perenggan 53).

(4) Pada masa yang sama kes ini melibatkan pertuduhan di bawah s 379 KK, kesemua perayu telah diberikan jaminan dan kini bebas. Alasan bahawa salah seorang daripada mereka adalah pelajar di institusi pengajian tinggi tidak mewajarkan majistret untuk memberikan perintah A&D dalam kes I ini. Ia tidak tergolong dalam tindakan yang menindas perayu-perayu dalam kes ini. Selain itu, perayu-perayu juga tidak dapat menunjukkan bahawa keputusan pendakwa raya untuk menggunakan s 254 KTJ dalam kes ini adalah salah satu penyalahgunaan proses mahkamah. Di samping itu mahkamah juga mendapati tiada keterangan dan hujahan yang

menunjukkan bahawa tindakan tersebut adalah bertentangan dengan kepentingan awam. Oleh yang demikian, mahkamah berpendapat keputusan majistret memberikan perintah DNAA adalah teratur dan tidak memerlukan gangguan Mahkamah Tinggi (lihat perenggan 54–56).

[English summary

The appellants were charged under s 379 of the Penal Code ('the PC), however, after the prosecution's first witness finished giving evidence, the deputy public prosecutor ('the DPP') applied to the magistrate under s 254 of the Criminal Procedure Code ('the CPC') for the appellants to be granted a discharge not amounting to acquittal ('DNAA') on the grounds that the DPP wanted to review the case due to the evidence that had been raised in this case. The appellants' counsel applied for discharge amounting to acquittal ('A&D') on the grounds that one of the appellants was a student at a higher education institution. The magistrate had ordered that the appellants be granted DNAA, hence, the present appeal. The questions that arose in this appeal were: (a) whether the magistrate exercised a proper discretion in considering the DNAA order in this case; and (b) whether the court in the present appeal should interfere in the exercise of the magistrate's discretion.

Held, dismissing the appellants' appeal:

(1) The approach that could be considered by the court when the DPP applied to stay the proceedings under s 254 of the CPC was as followed: (a) when the application was made, the court should first consider granting a DNAA order; (b) after examining the information provided by the DPP regarding the stay application and the court was of the opinion that there was no indication that the case could be pursued in the future due to the death of the main witness, the death of the accused or the fact that the main witnesses could not be found, then the court may consider A&D order. If the trial had taken a long time and prejudiced the accused then the A&D order could be considered; (c) the court should also consider whether by giving the DNAA order it was an oppression to the accused; (d) the court should also consider whether the act of granting the DNAA was based on the abuse of the court process; and (e) the court should also consider whether the granting of the DNAA was contrary to public interest. If findings (c), (d) and (e) were in the positive then the court could consider the A&D order (see para 36).

(2) This meant that when the court was considering whether to grant a DNAA or A&D order, it could not be done casually. The court ought to consider the above guidelines as the basis for the decision to make an appropriate order. At the same time the court should also consider the jurisdiction of the public prosecutor as provided under art 145(3) of the Federal Constitution and s 376 of the CPC (see para 37).

(3) It was clear from the note of evidence that the prosecution had informed the court that a review would be made following the evidence that had been given in this case. It suggested that further action would be taken following the witnesses' testimony presented in court. It may or may not result in the prosecution being continued against the appellants. It was within the discretion of the public prosecutor. The note of evidence did not show that the investigation had been completed for this case and the prosecution would not proceed with the prosecution of the appellants. In other words, the prosecution still had the intention to continue the prosecution based on the results of the review that would be conducted by the prosecution (see para 53).

(4) At the same time this case involved a charge under s 379 of the PC, all the appellants had been granted bail and were now free. The grounds that one of them was a student in a higher education institution did not justify the magistrate to grant an A&D order in this case. It did not fall under the act of oppressing the appellants in this case. In addition, the appellants were also unable to show that the prosecutor's decision to use s 254 of the CPC in this case was an abuse of court process. Further, the court also found that there was no evidence and argument that showed that the action was against the public interest. Therefore, the court held that the magistrate's decision to grant the DNAA order was orderly and did not warrant the interference of the High Court (see paras 54–56).]

Kes-kes yang dirujuk

Ahmad Danial bin Mohamed Rafa'ee v PP [2023] SGHC 94, MT (dirujuk)
Goddard against Smith (1704) 87 ER 1008, KBD (dirujuk)
Goh Oon Keow (F) and another v Rex [1949] 1 MLJ 35 (dirujuk)
K Abdul Rasheed v PP; Ah Chak Arnold v PP [1985] 1 MLJ 193 (dirujuk)
Koh Teck Chai v PP [1968] 1 MLJ 166 (dirujuk)
Kuppusamy v PP [1948] 1 MLJ 25 (dirujuk)
Mat v PP [1963] 1 MLJ 263 (dirujuk)
Poh Cho Hing v PP [1982] 1 MLJ 86 (dirujuk)
PP v Ambika a/p MA Shanmugam [2021] 2 MLJ 723; [2021] 2 CLJ 522, MR (dirujuk)
PP v David Noordin [1980] 2 MLJ 146 (dirujuk)
PP v Lee Chan Sang [1989] 1 MLJ 224, MA (dirujuk)
PP v Syed Abdul Bahari Shahabuddin [1976] 1 MLJ 87 (dirujuk)
Seet Ah Ann v PP [1950] 1 MLJ 293b (dirujuk)
The Queen against Ridpath (1713) 88 ER 670, KBD (dirujuk)
The Queen, on the Prosecution of Gregory, against Allen (1862) 121 ER 929, KBD (dirujuk)
Vigny Alfred Raj a/l Vicetor Amratha Raja v PP [2022] 5 MLJ 639, MP (dirujuk)

Undang-undang yang dirujuk

Criminal Procedure Code [SG] ss 183(1), 232
Kanun Keseksaan ss 130, 379
Kanun Tatacara Jenayah ss 171, 173, 178, 179, 180 181, 182, 182A, 254, 254(3), 376
Perlembagaan Persekutuan perkara 145(3)
Prosecution of Offences Act 1985 [UK]

Ahmad Zahid Hashim (Ahmad Zahid) bagi pihak perayu.
Lee Wai Yi (Timbalan Pendakwa Raya, Jabatan Peguam Negara) bagi pihak responden.

Roslan Mat Noor H:

[1] Ini adalah rayuan terhadap keputusan majistret yang telah memerintahkan supaya perayu-perayu diberikan pelepasan tidak terjumlah kepada satu pembebasan ('DNAA'). Perayu-perayu memohon supaya mereka dilepaskan yang membawa kepada pembebasan ('A&D').

[2] Penelitian kepada rekod rayuan menunjukkan bahawa perayu-perayu telah dituduh di bawah s 379 Kanun Keseksaan. Pertuduhan adalah seperti berikut:

> Bahawa kamu bersama-sama pada 10/12/2021 lebih kurang jam 0500 petang, bertempat di Kawasan Felda Tembangau 8, di dalam Daerah Bera, di dalam Negeri Pahang, dengan sengaja telah mencuri 2 ekor lembu milik Anrian a/l Mickel, No KP: 860715–56–5399. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 379 Kanun Keseksaan.

[3] Pada 25 Mei 2023 timbalan pendakwa raya telah memaklumkan kepada mahkamah seperti yang terdapat di halaman 26 rekod rayuan Jld 2. la dilakukan selepas saksi pertama pihak pendakwaan telah selesai memberikan keterangan. Timbalan pendakwa raya memohon kes diberikan pelepasan tidak terjumlah kepada satu pembebasan (DNAA). Sebaliknya peguam perayu-perayu memohon agar mahkamah memerintahkan perayu-perayu dilepaskan yang membawa kepada pembebasan (A&D) kes tersebut.

[4] Penelitian kepada nota keterangan juga telah menunjukkan bahawa secara jelas bahawa timbalan pendakwa raya memohon mahkamah menggunakan budi bicara di bawah s 254 Kanun Tatacara Jenayah ('KTJ'). Ini dapat dilihat seperti berikut:

> TPR — Hari ini ditetapkan sambung bicara di peringkat pendakwaan. Arahan daripada Pengarah Pendakwaan Negeri (PPN) adalah kes dilepaskan tanpa dibebaskan (DNAA) dengan alasan untuk kajian semula kes rentetan daripada keterangan yang telah dibangkitkan sebelum ini.

[5] Seksyen 254 KTJ menyatakan seperti berikut:

> 254 Public Prosecutor may decline to prosecute further at any stage
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> (1) At any stage of any trial, before the delivery of judgment, the Public Prosecutor may, if he thinks fit, inform the Court that he will not further prosecute the accused upon the charge and thereupon all proceedings on the charge against the accused shall be stayed and the accused shall be discharged of and from the same.
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> (2) At any stage of any trial before a Sessions Court or a Magistrates Court before the delivery of judgment, the officer conducting the prosecution may, if he thinks fit, inform the Court that he does not propose further to prosecute the accused upon the charge, and thereupon all proceedings on the charge against the accused may be stayed by leave of the Court and, if so stayed, the accused shall be discharged of and from the same.
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> (3) Such discharge shall not amount to an acquittal unless the Court so directs.

[6] Bidang kuasa dan budi bicara pendakwa raya untuk mengendalikan perbicaraan jenayah terdapat di bawah s 376 KTJ yang memperuntukkan seperti berikut:

> 376 Public Prosecutor
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> (1) The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code ...

[7] Malahan di dalam perkara 145(3) Perlembagaan Persekutuan pula memperuntukkan seperti berikut:

> (3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

[8] Seksyen 254 KTJ ini telah diputuskan adalah sama dengan *nolle prosequi* di United Kingdom. Ini telah dinyatakan dalam kes *Poh Cho Hing v Public Prosecutor* [1982] 1 MLJ 86 di mana YA Hakim Wan Yahya menyatakan seperti berikut:

> The reasoning is indeed a novel one if withdrawal of a charge against the giver negates involvement in the act, which he was alleged to have committed, or the withdrawal of charges against him was affected before the acceptor pleaded guilty. But would such an implication arise in our present case? I do not think so. The power to withdraw a charge against any person and to discontinue proceedings is spelt out in s 254 of the Criminal Procedure Code and art 145(3) of the Federal Constitution, which read as follows:
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> > 254(i) At any stage of any trial, before the delivery of judgment, or in the case of a trial by jury before the return of the verdict, the Public Prosecutor may, if he thinks fit, inform the court that he will not further prosecute the accused upon the charge and thereupon all proceedings on such charge against the accused

shall be stayed and the accused shall be discharged of and from the same. A

(ii) At any stage of any trial before a Sessions Court or the Court of a Magistrate before the delivery of judgment, the officer conducting the prosecution may, if he thinks fit, inform the court that he does not propose further to prosecute the accused upon the charge, and thereupon all proceedings on such charge against the accused may be stayed by leave of the court and, if so stayed, the accused shall be discharged of and from the same. B

(iii) Such discharge shall not amount to an acquittal unless the court so directs.

Art 145(3). The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Muslim court, a native court or a court-martial. C

This power, exercisable by the Public Prosecutor, who is the Attorney-General, is similar to the power to stay proceedings in English courts and better known technically as nolle prosequi. This power may be invoked by the Attorney-General in various instances, to cite one instance, in cases where he requires a co-accused. to give evidence for the crown against the other accused person. This power undoubtedly confers upon the Attorney-General an unrestricted discretion in respect of which he is expected to exercise extreme fairness and sagacity. But whether he does so or not, it is not for the courts to decide. The exercise of such power by the Attorney-General is not subject to control by our courts but in most democratic governments is questionable elsewhere — perhaps in Parliament. It is not for the courts, therefore, to enquire into the manner or reasons for the exercise of nolle prosequi. In the absence of this information this court is unable to imply that mere withdrawal of a charge against a co-accused by the Public Prosecutor presupposes that the co-accused had taken part in the offence. D E F

[9] *Nolle prosequi* telah ditakrifkan dalam *Black's Law Dictionary* (7th Ed) seperti berikut:

nolle prosequi [Latin 'not to wish to prosecute] 1. A legal notice that a lawsuit has been abandoned. 2. A docket entry showing that the Plaintiff or the prosecution has abandoned the action. — often shortened to nolle. G

[10] Penelitian kepada sejarah perundangan di United Kingdom mendapati bahawa *nolle prosequi* telah dimulakan semasa pemerintahan Raja Charles II. Ini dinyatakan dalam kes *Goddard against Smith* (1704) 87 ER 1008 seperti berikut: H

Holt, Chief Justice, said, that he had known it thought very hard that the Attorney General should enter nolle prosequi upon indictments, and that it began first to be practised in the latter end of King Charles the Second's reign, but that on informations it had been frequently doue: and he ordered precedents to be searched if any were in Mr Attorney Palmer or Nottingham's time. I

Harcourt, Master of the Office. There never has been any proceedings after a *nolle prosequi*.

[11] Penelitian lanjut kepada rentetan sejarah *nolle prosequi* di United Kingdom menunjukkan bahawa ia tidak menghalang tindakan lanjut oleh Peguam Negara walaupun *nolle prosequi* telah dikeluarkan. Ini telah dinyatakan dalam kes *Goddard v Smith 2 Salk 465* seperti berikut:

> Ss W R being indicted for barratry, the Attorney-General entered a non pros (viz) quod. attorn generalis domince Regina, ipsum inde non vult ulterius prosequi; whereupon W R brought an action on the case against the prosecutor, for a false and malicious indictment prosecuted against him (the plaintiff) et quod fuit debito modo inde exoneratus, and at the trial gave this non pros in evidence: Sed per Curiam, It ought to be an acquittal upon the merits of the cause, which was never tried in this case, and there was no default in the defendant in not having it tried: Et per Holt, Ch Just. This is no discharge, it is only putting the defendant sine die, the attorney may take out new process if he will. Sed per Harcourt, Clerk of the Crown-Office, It was never yet done; non pros's have been frequent upon informations, but never upon indictments, till the reign of Car 2, and the court thought it hard that the Attorney-General should allow them.

[12] Sementara itu, dalam kes *The Queen against Ridpath* (1713) 88 ER 670 dinyatakan seperti berikut:

> Thirdly, that the entering of a *nolle prosequi* was a bar to the offence contained in the information; at least that it was a discharge from any further prosecution for it; and that it was all one, whether he was discharged from the recognisance by rule of court made for that purpose, or by a judgment, that by a necessary consequence amounted to a discharge.
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> But the court were of opinion, that the recognizance extended to all crimes whatever which he should be charged with; and that if it had relation to any particular crime only, it must be mentioned in the recognisance; but that is only 'ad respondendum' generally. That there was no such inconvenience as was pretended; the bail in this case being bound in a sum certain, and not to stand in the place of the principal, as in civil cases: that the person's not appearing according to his recognisance, his absence (be the cause or reason of it what it will) was the cause of the forfeiture of the recognisance. That anciently in special bail in civil actions, where the bail is to stand in the place of the principal, bail to one action was to stand bail to all actions that he should be charged with when in court. That this was hard in case of special bail, and is therefore now altered, though altered only by rule of court; and that as to common bail the law is still the same. That the *nolle prosequi* was neither a bar nor discharge.

[13] Dalam kes *The Queen, on the Prosecution of Gregory, against Allen* (1862) 121 ER 929 Hakim Cockburn menyatakan:

> I am of opinion that there ought to be no rule in this case. It is an undoubted power of the Attorney General, as representative of the Crown in matters of criminal judicature, to enter a *nolle prosequi*, and thereby to stay proceedings in any indictment or criminal proceeding. No instance has been cited, and therefore it may be presumed that none can be found, in which, after a *nolle prosequi* has been

entered by the fiat of the Attorney General, this court has taken upon itself to award fresh process or has allowed any further proceedings to be taken on the indictment. A

Nor, if the court were to take that unprecedented course, is there anything to prevent the Attorney General from entering a *nolle prosequi toties quoties*. It is not for us to create a precedent which is contrary to the established practice, and which would be fraught with great inconvenience. Our attention has been called to the practice of Attorney General in his office, as laid down in the books, to summon the prosecutor, and hear the parties before granting his fiat for a *nolle prosequi*. I think that is a wholesome practice; and generally the law officer of the Crown, before entering a *nolle prosequi* either *ex mero motu* or at the instance of the defendant, and thereby debarring the prosecutor from proceeding further, would act wisely in calling the prosecutor before him; but, from particular circumstances known to him, or from the nature of the charge, he may feel called upon to grant his fiat for a *nolle prosequi* without adopting that course. Suppose it possible that there could be an abuse of his power by the Attorney General, or injustice in the exercise of it, the remedy is by holding him responsible for his acts before the great tribunal of this country, the High Court of Parliament. I have no doubt that the Attorney General has this power; and this court has never interfered with it. B C D

[14] Kini *nolle prosequi* akan diberikan dalam keadaan apabila seseorang tertuduh tersebut tidak dapat hadir ke mahkamah disebabkan kecacatan mental atau fizikal. Ini dinyatakan dalam *Archbold 2000 Criminal Pleadings, Evidence and Practise* (Sweet & Maxwell) di halaman 103 seperti berikut: E

A *nolle prosequi* is now usually directed to be entered in cases where the accused person cannot to produced in court to plead or stand his trial owning to physical or mental incapacity which is expected to be permanent. A *nolle prosequi* may be entered as to one of several defendants. F

[15] Penelitian kepada kedudukan *nolle prosequi* kini dalam prosiding jenayah di United Kingdom menunjukkan bahawa *nolle prosequi* adalah salah satu daripada cara penamatan prosiding. G

[16] Di United Kingdom istilah yang digunakan adalah penamatan prosiding (*termination of proceedings*). la terdiri daripada penarikan balik pertuduhan, pemberhentian (*discontinue*), tidak menawarkan keterangan (*offering no evide*nce) dan *nolle prosequi*. Ini dapat dilihat misalnya dalam Prosecution of Offences Act 1985 seperti berikut: H

23 Discontinuance of proceedings in magistrates' courts

(1) Where the Director of Public Prosecutions has the conduct of proceedings for an offence, this section applies in relation to the preliminary stages of those proceedings. I

(2) In this section, 'preliminary stage' in relation to proceedings for an offence does not include —

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(a) any stage of the proceedings after the court has begun to hear evidence for the prosecution at a summary trial of the offence; or

(b) any stage of the proceedings after the accused has been sent for trial for the offence.

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(3) Where, at any time during the preliminary stages of the proceedings, the Director gives notice under this section to the designated officer for the court that he does not want the proceedings to continue, they shall be discontinued with effect from the giving of that notice but may be revived by notice given by the accused under subsection (7) below.

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(4) Where, in the case of a person charged with an offence after being taken into custody without a warrant, the Director gives him notice, at a time when no magistrates' court has been informed of the charge, that the proceedings against him are discontinued, they shall be discontinued with effect from the giving of that notice.

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(5) The Director shall, in any notice given under subsection (3) above, give reasons for not wanting the proceedings to continue.

(6) On giving any notice under subsection (3) above the Director shall inform the accused of the notice and of the accused's right to require the proceedings to be continued; but the Director shall not be obliged to give

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the accused any indication of his reasons for not wanting the proceedings to continue.

(7) Where the Director has given notice under subsection (3) above, the accused shall, if he wants the proceedings to continue, give notice to that effect to the designated officer for the court within the prescribed period;

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and where notice is so given the proceedings shall continue as if no notice had been given by the Director under subsection (3) above.

(8) Where the designated officer for the court has been so notified by the accused he shall inform the Director.

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(9) The discontinuance of any proceedings by virtue of this section shall not prevent the institution of fresh proceedings in respect of the same offence.

(10) In this section 'prescribed' means prescribed by Criminal Procedure Rules.

[17] Begitu juga di bawah s 23A Akta tersebut seperti berikut:

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23A Discontinuance of proceedings after accused has been sent for trial

(1) This section applies where —

(a) the Director of Public Prosecutions, or a public authority (within the meaning of section 17 of this Act), has the conduct of proceedings for an offence; and

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(b) the accused has been sent for trial ... for the offence.

(2) Where, at any time before the indictment is preferred, the Director or authority gives notice under this section to the Crown Court sitting at the

place specified in the notice under section 51D(1) of the Crime and Disorder Act 1998 that he or it does not want the proceedings to continue, they shall be discontinued with effect from the giving of that notice.

(3) The Director or authority shall, in any notice given under subsection (2) above, give reasons for not wanting the proceedings to continue.

(4) On giving any notice under subsection (2) above the Director or authority shall inform the accused of the notice; but the Director or authority shall not be obliged to give the accused any indication of his reasons for not wanting the proceedings to continue.

(5) The discontinuance of any proceedings by virtue of this section shall not prevent the institution of fresh proceedings in respect of the same offence.

[18] Oleh itu pada hemat mahkamah adalah tidak tepat menyatakan bahawa s 254 KTJ adalah *nolle prosequi* seperti yang difahami dan diamalkan dalam prosiding jenayah di United Kingdom walaupun ia dilihat hampir sama dengan *nolle prosequi* namun pada hakikatnya ia bukan *nolle prosequi.*

[19] Mahkamah ini merujuk kepada pemakaian s 254 KTJ yang telah dinyatakan dalam kes-kes yang terdahulu iaitu dalam kes *Kuppusamy v Public Prosecutor* [1948] 1 MLJ 25. Dalam kes tersebut majistret telah diberitahu oleh pengadu bahawa dia tidak bersedia untuk mengemukakan keterangan dan memohon penangguhan. Dalam kes tersebut majistret telah memberikan pelepasan tidak terjumlah kepada satu pembebasan (DNAA). Dalam kes tersebut YA Hakim Murray-Aynsley menjelaskan pemakaian s 254 KTJ dengan jelas seperti berikut:

In this case the complainant was not ready with her evidence and asked for an adjournment.

The Magistrate made an order that the defendants should be discharged 'without amounting to an acquittal'.

Against this order one of the defendants appeals. It is contended on his behalf that he should be acquitted. It seems that a Magistrate may in a case make the following orders (a) he may find the person guilty; (b) he may acquit the accused; (c) he may discharge the accused; or (d) in cases under section 254 order a discharge amounting to an acquittal. The present case does not come under section 254.

By section 302 (v) the dismissal of a complaint or the discharge of the accused is not an acquittal for the purposes of this section.

Section 254 (ii) provides such discharge shall not amount to an acquittal unless the Court so directs, except in cases coming under section 171. Such discharge means, however, discharge under section 254. Therefore for a discharge to amount to an acquittal without a special order of the Magistrate it must fall within the provisions of section 254 as well as of section 171.

[20] Mahkamah juga telah menyentuh isu berkenaan dengan tindakan menarik balik pertuduhan seperti yang dinyatakan dalam kes *Goh Oon Keow (F) and another v Rex* [1949] 1 MLJ 35 di mana Murray-Aynsley CJ menyatakan seperti berikut:

> In this case the appellants were charged with various offences against Proclamation No 43. Certain charges were withdrawn and in respect of these the learned district judge made an order of discharge not amounting to an acquittal. Against this order there is an appeal. As counsel for the prosecution has not opposed an order of discharge amounting to an acquittal, it is not necessary for me, in making such an order, to say anything about this particular case, *but I think this is a suitable occasion to point out that the power given by s 187 of the Criminal Procedure Code to the presecution may, unless vigilance is displayed by courts of summary jurisdiction, result in oppression and that it is the duty of such courts to prevent this*.

[21] Seterusnya dalam kes *Seet Ah Ann v Public Prosecutor* [1950] 1 MLJ 293b timbalan pendakwa raya semasa mengendalikan perbicaraan setelah keterangan direkodkan tanpa kehadiran perayu berpendapat bahawa kes tersebut tidak boleh diteruskan lagi dan memohon supaya mahkamah memberikan perintah dilepaskan tanpa dibebaskan dan memaklumkan bahawa perayu akan dipanggil menjadi saksi terhadap seorang bernama Yap Fook Cheong. Peguam perayu dalam kes tersebut memohon supaya perayu dibebas dan dilepaskan. Namun Presiden Mahkamah Sesyen telah membuat perintah dilepaskan tanpa dibebaskan. Hakim Abbott J telah memberikan pandangan yang menarik seperti berikut:

> In the view of this court the power, given by s 187 of the Criminal Procedure Code, enabling the discharge of accused persons without acquitting them is a power which should be exercised only sparingly and grudgingly and only used where the court is satisfied, for good cause shown, that the public interest insistently demands that it be used. *This power does not exist in England*. It is difficult to imagine circumstances in which it can be right and, as such, just to leave an individual for an indefinite period with a criminal charge hanging over him. In this particular case it appears that the prosecution contemplated just such an indefinite period for when, during the course of the arguments before me, I asked the deputy public prosecutor whether he intended to resume the prosecution of the appellant he informed me in terms that he would not commit himself to say either way.
>
> I pause here to say that it is a well-established practice in the criminal courts of England that a co-accused person is called as a witness only after he has been dealt with for his offence or after he has been acquitted of it. Notwithstanding the provisions of s 187 of the Criminal Procedure Code, I can conceive of no circumstances in Malaya which could justify any departure from the English practice to which I have referred. In the present case it could have been suggested that the withdrawal of the case against the appellant, while holding the Sword of Damocles over his head as to whether the proceedings would be resumed or not, was done in order to induce him to give evidence satisfactory to the Crown — but I hasten to add that I do not impute any lack of integrity on the part of the deputy

public prosecutor in asking for the order to be made, nor, of course, do I impute any impropriety on the part of the President of the Sessions Court in making it.

The order must be set aside and, in substitution for it, there shall be an order of this court that the appellant be discharged and acquitted.

[22] Seterusnya dalam kes *Public Prosecutor v Syed Abdul Bahari Shahabuddin* [1976] 1 MLJ 87 YA Hakim Abdoolcader menyatakan seperti berikut:

I would only pause to observe that when there is no reasonable prospect of a case proceeding as a result of the absence of one or more witnesses or for some other cogent reason, then the prosecution should act under the provisions of s 254 of the Criminal Procedure Code. Sub-section (iii) of s 254 specifically enacts that a discharge under that section shall not amount to an acquittal unless the court so directs. It is settled law that unless there are good grounds to the contrary, a discharge under this provision should amount to an acquittal. Good grounds for a discharge not amounting to an acquittal would arise where the prosecution is unable to proceed for the time being but can satisfy the court that the temporary impediment is not unsurmountable and that it will proceed within a reasonable time. This seems to be the *raison d'etre* for the scheme providing for a discharge not amounting to an acquittal.

[23] Dalam kes *Koh Teck Chai v Public Prosecutor* [1968] 1 MLJ 166 YA Hakim Ong Hock Sim telah memberikan pejelasan pandangan berkenaan dengan s 254 KTJ seperti berikut:

This power enabling the discharge of an accused person without acquitting him is a power which should be exercised sparingly and grudgingly and only where the court is satisfied for good cause shown that the public interest insistently demands that it be used. (*Seet Ah Ann v Public Prosecutor* [1950] 1 MLJ 293b). Our courts have consistently adopted the line that unless some very good ground is shown it would not be right to leave an individual for an indefinite period with a charge hanging over him. (*Goh Oon Keow v Rex* [1949] 1 MLJ 35; *Tan Ah Chan v Regina* [1955] 1 MLJ 218). As Mr Justice Spenser-Wilkinson said in *Public Prosecutor v Suppiah Pather* reported in to *Ariffin bin Cassim Jayne Public Prosecutor* [1953] 1 MLJ 126.

[24] Seterusnya dalam kes *Public Prosecutor v David Noordin* [1980] 2 MLJ 146 mahkamah telah memberikan perintah pelepasan tidak terjumlah kepada satu pembebasan (DNAA) apabila timbalan pendakwa raya memaklumkan bahawa kes tidak dapat diteruskan disebabkan saksi berada di luar negara. Hakim dalam kes tersebut berpendapat keterangan yang dikemukakan setakat perbicaraan yang dijalankan tidak tergolong dalam keadaan yang tidak berasas. la juga tidak berpunca daripada keputusan timbalan pendakwa raya yang tidak mahu meneruskan kes di bawah s 254 KTJ. Hakim telah menyentuh berkenaan dengan peruntukan di bawah s 254 KTJ tersebut dengan

menyatakan seperti berikut:

> The alleged offences took place more than seven years ago. The trial has dragged on for more than five years. It has been postponed 13 times and a considerable amount of valuable court time and public expense have been wasted. All concerned must share in the blame. But the case should not go on indefinitely because that will be a great injustice to the accused. The public prosecutor should therefore review this case and if he decides to proceed, to do so within a reasonable time. On the other hand, it may well be that they cannot proceed with the case now as the prosecution witnesses are overseas and their dates of return unknown. In that event the prosecution should apply to the court to stay the proceedings under s 254(ii) of the Criminal Procedure Code and the learned magistrate would be justified in making an order of discharge not amounting to acquittal. If such an order is made, it should not be followed by a prompt re-arrest and recharge because it will be inconsistent with the grounds on which the application for stay was made. The accused should only be re-arrested if at all, when the prosecution is in a position to proceed with the trial.

[25] Dalam kes *K Abdul Rasheed v Public Prosecutor; Ah Chak Arnold v Public Prosecutor* [1985] 1 MLJ 193 Mahkamah Tinggi di Singapura telah memberikan pencerahan kepada peruntukan di bawah s 183(1) KTJ di Singapura yang *pari materia* dengan s 254 KTJ di Malaysia di mana dalam kes tersebut telah dinyatakan bahawa mahkamah harus meneliti fakta dan keterangan dalam sesuatu kes yang berbeza di antara satu sama lain bagi menentukan pemakaian seksyen tersebut dengan menyatakan seperti berikut:

> It is not desirable to set down any principle which a court must follow when acting under sub-s 183(2) of the Code as if it is writ in stone and thereby fetter the discretion of the court which has to be judicially exercised. Circumstances do vary from case to case. Each case has to be dealt with on its merits, with the court bearing in mind the public interest and the right of the individual to which I have alluded.

[26] Seterusnya mahkamah juga menyatakan seperti berikut berkaitan dengan pemakaian seksyen tersebut kepada fakta dalam kes itu iaitu:

> The learned district judge was informed that two principal prosecution witnesses were not available. On that basis the learned deputy public prosecutor applied that the appellant be discharged not amounting to an acquittal. Obviously, the prosecution indicated that it was not going on, indeed was unable to go on, with the prosecution but there was no indication that it will never ever prefer the same charges against the appellant. It was equally obvious that in applying for a discharge not amounting to an acquittal, the prosecution was acting under sub-s 183(1) of the Code. In the course of the appeal, it was disclosed to me and it was not challenged by the learned deputy public prosecutor, who had not appeared before the learned district judge, that one of the two witnesses had died and that the other, a foreigner, was unavailable and likely to remain unavailable for an indefinite period. I was further told that the appellant had been reinstated in the Singapore Police Force after he had faced certain disciplinary proceedings and had emerged unscathed.

Through his counsel, he asked that he be afforded the opportunity of a trial to clear his name and indicated that he was prepared to stand trial if the prosecution could indicate if it was able to proceed. The learned deputy prosecutor was unable to give the court any such indication. I was accordingly persuaded that it would be unfair to subject him to any further agony and I directed that the discharge should amount to an acquittal.

[27] Dalam hal ini mahkamah merujuk kepada kes *Public Prosecutor v Ambika a/p MA Shanmugam* [2021] 2 MLJ 723; [2021] 2 CLJ 522 di mana Mahkamah Rayuan memutuskan bahawa mahkamah mempunyai kuasa untuk melepaskan dan membebaskan tertuduh di bawah s 254(3) KTJ. Fakta dalam kes tersebut menunjukkan bahawa terdapat perhubungan surat antara peguam tertuduh dan kamar Peguam Negara dan terdapat pengesahan daripada Jabatan Peguam Negara yang menyatakan seperti berikut 'Pendakwaan terhadap anak guam Tuan tidak akan diteruskan di bawah s 254 Kanun Tatacara Jenayah'. Semasa perbicaraan kes ini di Mahkamah Tinggi apabila dikemukakan soalan sama ada ingin meneruskan semula pertuduhan ini atau tidak timbalan pendakwa raya telah menyatakan jawapan seperti yang terdapat di perenggan [4] kes tersebut seperti berikut:

TPR: untuk kes ini terdapat representasi yang dimasukkan oleh pihak peguam. Saya ingin kes ini diDNAA di bawah seksyen 254 CPC.

Mahkamah: Kenapa?

TPR: Atas arahan.

Mahkamah: Kenapa DNAA? Nak tarik balik tuduhan ke tak mahu teruskan ke. Apa alasan?

TPR: Arahan kepada saya adalah untuk memohon DNAA, Yang Arif.

Mahkamah: tidak mahu meneruskan pendakwaan?

PR: Ya, Yang Arif, setakat ini.

Mahkamah: Arahan untuk tidak meneruskan pendakwaan ini?

TPR: Arahan untuk DNAA dahulu.

Mahkamah: Mesti ada sebab. Peguambela ada apa-apa hendak kata?

Peguambela: Memandangkan arahan telah diperolehi.

Mahkamah: Setuju dengan DNAA atau tidak?

Peguambela: Tidak, Yang Arif. Memandangkan mereka tidak ingin teruskan perbicaraan pada hari ini, saya percaya mereka menggunakan seksyen 254 CPC, saya pohon budibicara Mahkamah untuk menggunakan seksyen 254(3) di mana Mahkamah mempunyai budibicara mutlak dalam menentukan sama ada kes ini dilepaskan dan dibebaskan. Untuk makluman Mahkamah beberapa representasi telah pun dihantar kepada pihak Pendakwaan. Saya percaya this is the deserving case. Saksi telah memberi keterangan. There is no evidence at all in use. This case

saksi telah memberi keterangan pada peringkat ini arahan untuk tidak diteruskan DNAA. Therefore, I'm praying to my Lord to use section 254(3) given acquittal from the trial. Looking at the age, actually she is about 65 and health conditions as well. Pohon pertimbangan dan budibicara Mahkamah untuk melepaskan dan membebaskan OKT.

[28] Inilah yang menjadi asas pada hemat mahkamah ini apabila Mahkamah Rayuan menyatakan bahawa tiada alasan untuk pihak pendakwaan memohon satu perintah pelepasan tidak terjumlah kepada satu pembebasan (DNAA). Ini dinyatakan di perenggan [25] penghakiman tersebut seperti berikut:

> [25] In the instant case, the prosecution had decided not to proceed with the prosecution against the respondent and this decision was conveyed to the respondent's counsel by the letter dated 16 April 2019. There is no issue of the prosecution having temporary impediment to proceed with the prosecution of the case. In fact, the prosecution had agreed for the charge against the respondent to be dropped. As such, there is no good grounds available for the prosecution to ask for the case to be DNAA.

[29] Akhirnya Mahkamah Persekutuan dalam kes *Vigny Alfred Raj a/l Vicetor Amratha Raja v Public Prosecutor* [2022] 5 MLJ 639 telah memberikan kedudukan s 254 KTJ melalui keputusan majoriti bahawa kedudukannya adalah sama seperti sebelum ini iaitu apabila pendakwa raya memaklumkan ingin menangguhkan prosiding di bawah s 254 KTJ maka mahkamah hendaklah mempertimbangkan perintah pelepasan tidak terjumlah kepada satu pembebasan (DNAA) melainkan terdapatnya arahan daripada mahkamah sebaliknya untuk kes tersebut dilepaskan yang membawa kepada pembebasan (A&D). Ini dinyatakan di perenggan [6] dan [11] seperti berikut:

> [6] It is my view that, a plain and literal reading of s 254(3) of the CPC means that any discharge granted by the court under s 254, is a discharge not amounting to an acquittal. But for a discharge amounting to an acquittal, it must be specifically directed by the court. The opening wordings of the section are clear and unambiguous, hence the court must give effect to its plain and literal meaning. In this regard the remarks by Suffian LP in *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273 are relevant when His Lordship said:
>
> > The words of Lord Diplock in an authority cited by my Lord President, *Duport Steels Ltd v Sirs* seems to me to be particularly apt, for the role of the judiciary is confined to ascertaining from the words that parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral.
>
> [11] My learned brother Zawawi Salleh FCJ has read this judgment in draft and agreed with its contents.

[30] Walau bagaimanapun dalam kes *Vigny Alfred Raj a/l Vicetor Amratha Raja v Public Prosecutor* tersebut Mahkamah Persekutuan telah memerintahkan tertuduh dibebaskan dan dilepaskan. Ini adalah disebabkan fakta dalam kes tersebut seperti yang terdapat di perenggan [90] hingga [94] seperti berikut:

> [90] In this appeal, the learned DPP had asked the High Court to grant an order of a DNAA after informing that the AG/PP had decided not to continue with the prosecution of the charge against the appellant as 'the investigation [sic] still going on'. This explanation is both troubling and telling.
>
> [91] In *Public Prosecutor v Au Seh Chun*, Suriyadi J in discussing when an order for a DAA may be ordered by the court under s 173(f) alluded to a hypothetical scenario where a request for an adjournment of an ongoing trial is sought on the basis that investigation is yet to be completed. His Lordship explained that it would be quite proper for the court to consider the charge as being groundless under s 173(f) if it be a summary trial as 'no self-respecting deputy public prosecutor will charge a person unless the investigation is considered complete. It is only at the end of the investigation that the executive action is determined'. By executive action, His Lordship was referring to the decision to charge.
>
> [92] I agree with that view. There should not have been a charge in the first place if the investigations were 'still going on' or incomplete. It would be an aberration and a travesty on the administration of criminal justice if the courts were seen to condone a practice of charge now, investigate later. The prosecution's reason for a direction of DNAA under s 254(3) borders on abuse and oppression that cannot be endorsed by the court. In effect, had this been a summary trial, it would have shown that the prosecution had a groundless case and the accused must be acquitted and discharged.
>
> [93] What is even more glaring is that at the hearing of this appeal, learned DPP had informed this court that the investigations into the offence for which the appellant is charged 'are completed' and the public prosecutor has 'decided not to proceed with the charge in this case against the appellant'. Given these circumstances, the application for a DNAA by the prosecution ought to have been refused then; and with the prosecution now no longer pressing for a DNAA, the appellant must stand discharged and acquitted of the charge.
>
> [94] Clearly, there was no good or sound let alone decent ground, whether then or now, for the High Court to grant the order of DNAA. It is obviously not in the public interest to grant such an order and encourage such abhorrent practice which serves only to undermine the administration of criminal justice in this country.

[31] Di samping itu fakta dalam kes tersebut dapat dilihat di perenggan [13] yang menyatakan seperti berikut:

> [13] At the hearing of this appeal, the learned deputy public prosecutor ('DPP') rose to inform the court that the investigations into the offence for which the appellant is charged 'are completed' and the public prosecutor has 'decided not to proceed with the charge in this case against the appellant'. As to the appropriate orders that

A the court should make in such event, the learned DPP did not file any written submissions to this appeal, and offered no oral submissions except to say that the prosecution has decided to leave the answer to the issue 'to the wisdom of the court'. This is most unfortunate as I found no written submissions filed by the learned DPP in the courts below either; but that, thankfully, had not deterred both the High Court and the Court of Appeal in providing reasoned grounds for their respective decisions.

[32] Fakta tersebut telah pada hemat Mahkamah Persekutuan mewajarkan perintah dilepaskan yang membawa kepada pembebasan (A&D) diberikan dan bukannya pelepasan tidak terjumlah kepada satu pembebasan (DNAA). Ini digambarkan melalui penghakiman pada perenggan [2] kes tersebut seperti berikut:

> [2] I agree with the ultimate decision as stated in the said judgment that the facts in this case warranted for a direction of discharge amounting to an acquittal (DAA).

[33] Setelah meneliti keputusan-keputusan mahkamah berkenaan dengan pemakaian s 254 KTJ, apakah pendekatan yang perlu dibuat oleh mahkamah apabila pendakwa raya memaklumkan kepada mahkamah bahawa pihak pendakwaan ingin menangguhkan prosiding di bawah s 254 KTJ? Kes-kes di atas telah menunjukkan bahawa terdapat keadaan di mana perintah pelepasan tidak terjumlah kepada satu pembebasan (DNAA) diberikan dan ada juga kes di mana perintah dilepaskan yang membawa kepada pembebasan (A&D) diberikan. Ia adalah bergantung kepada keadaan dalam sesuatu kes.

[34] Dalam konteks ini adalah wajar sekiranya mahkamah meneliti garis panduan yang telah diberikan di Mahkamah Tinggi Singapura melalui penghakiman Yang Amat Arif Ketua Hakim Negara Singapura yang bersidang sebagai Mahkamah Tinggi ketika mendengar rayuan daripada keputusan mahkamah daerah yang melibatkan s 232 Criminal Procedure Code Singapura yang sama dengan s 254 KTJ dalam kes *Ahmad Danial bin Mohamed Rafa'ee v Public Prosecutor* [2023] SGHC 94 seperti berikut:

> 42 To summarise:
>
> (a) The presumptive position is that a DNATA should be ordernd. The presumptive position is stronger where the charge involves a serious offence, where the Prosecution is simply seeking a finite pause in the criminal proceedings or where the accused person has wrongfully contributed to the Prosecution's difficulties in proceeding with the charge.
>
> (b) The presumptive position may be displaced where the circumstances of the case are such that a DATA would strike a better balance between the public interest and the individual rights of the accused person. This could be the case where: (a) there is no real or reasonable prospect of a prosecution being pursued in the future; or (b) the charge was improperly brought.

(c) Any past prejudice caused to the accused person, whether or not arising due to the fault of the Prosecution, will not typically be relevant.

(d) In assessing the prospect of a future prosecution, the court is not required to make an objective assessment of the Prosecution's intended investigative efforts. A confirmation from the Prosecution that it is pursuing live leads and has reason to believe its investigations will bear fruit should suffice.

[35] Seksyen 232 Criminal Procedure Code 2010 Singapura memperuntukkan seperti berikut:

232 Public Prosecutor may decline to further prosecute at any stage of trial

(1) At any stage of any proceedings in court —

(a) before an accused is acquitted of any charge; or

(b) where an accused has been convicted of any charge but before the accused is sentenced for that charge,

the Public Prosecutor may, if he thinks fit, inform the court that the Public Prosecutor will not further prosecute the accused upon the charge, and the proceedings on the charge against the accused must then be stayed and the accused must be discharged from and of the same.

(2) Except in cases referred to in section 147, a discharge under subsection (1) does not amount to an acquittal unless the court so directs.

(3) Where an accused had previously been granted a discharge not amounting to an acquittal by a Magistrate's Court or District Court in relation to an offence triable in the State Courts, any Magistrate's Court or District Court (as the case may be) may grant the accused a discharge amounting to an acquittal on the application of the Public Prosecutor.

(4) Where an accused had previously been granted a discharge not amounting to an acquittal by a Magistrate's Court or District Court in relation to an offence triable in the General Division of the High Court, any Magistrate's Court or District Court (as the case may be) may grant the accused a discharge on the application of the Public Prosecutor.

(5) A discharge under subsection (4) has the effect of an acquittal.

(6) An application under subsection (3) or (4) may be granted by the court despite the absence of the accused.

[36] Pada hemat mahkamah ini secara ringkasnya, dapat disimpulkan bahawa pendekatan yang boleh dipertimbangkan oleh mahkamah ketika timbalan pendakwa raya ingin menangguhkan prosiding di bawah s 254 KTJ adalah seperti berikut:

(a) apabila permohonan di bawah s 254 KTJ dibuat mahkamah harus mempertimbangkan terlebih dahulu untuk memberikan perintah

pelepasan tidak terjumlah kepada satu pembebasan (DNAA), *Vigny Alfred Raj a/l Vicetor Amratha Raja v Public Prosecutor*;

(b) setelah meneliti maklumat yang diberikan oleh timbalan pendakwa raya berkenaan permohonan penangguhan dan mahkamah berpendapat tiada sebarang petanda bahawa kes tersebut boleh diteruskan semula disebabkan saksi utama telah meninggal dunia, tertuduh telah meninggal dunia atau saksi-saksi utama tidak dapat ditemui maka mahkamah boleh mempertimbangkan untuk satu perintah dilepaskan yang membawa kepada pembebasan (A&D). Sekiranya tempoh perbicaraan yang dijalankan telah mengambil masa yang lama dan memprejudiskan tertuduh maka perintah dilepaskan yang membawa kepada pembebasan (A&D) boleh dipertimbangkan;

(c) mahkamah juga perlu menimbangkan adakah dengan memberikan perintah pelepasan tidak terjumlah kepada satu pembebasan (DNAA) ia adalah suatu penindasan kepada tertuduh;

(d) mahkamah juga perlu menimbangkan adakah tindakan memberikan pelepasan tidak terjumlah kepada satu pembebasan (DNAA) tersebut adalah berasaskan kepada penyalahgunaan proses mahkamah; dan

(e) mahkamah juga perlu menimbangkan adakah pemberian pelepasan tidak terjumlah kepada satu pembebasan (DNAA) tersebut bercanggah dengan kepentingan awam,

Jika dapatan (c), (d) dan (e) itu adalah positif maka pada hemat mahkamah ini, mahkamah boleh menimbangkan perintah dilepaskan yang membawa kepada pembebasan (A&D).

[37] Ini bermakna semasa mahkamah mempertimbangkan untuk memberikan pelepasan tidak terjumlah kepada satu pembebasan (DNAA) atau perintah dilepaskan yang membawa kepada pembebasan (A&D) ia tidak boleh dibuat sambil lewa. Mahkamah perlu mempertimbangkan garis panduan di atas sebagai asas kepada keputusan untuk membuat perintah yang sewajarnya. Pada masa yang sama mahkamah juga perlu mempertimbangkan bidang kuasa pendakwa raya yang telah diperuntukkan di bawah perkara 145(3) Perlembagaan Persekutuan dan s 376 KTJ. Dalam hal ini mahkamah juga merujuk kepada pandangan Yang Amat Arif Tun Tengku Maimun bt Tuan Mat, Ketua Hakim Negara dalam ucapan di Majlis Pembukaan Tahun Perundangan 2024 pada 15 Januari 2024 berkenaan perkara ini seperti berikut:

> [34] In particular, in the recent past including last year, the public prosecutor made the decision to withdraw criminal charges against certain high-profile individuals. These decisions were not particularly received well by the public but a large part of the blame was put on the Judiciary for making the only available consequential

orders upon the withdrawal of such charges.

[35] Under art 145(3) of the Federal Constitution the Attorney General who is also the public prosecutor has the discretion to institute, conduct or discontinue any proceeding for an offence other than before a Syariah Court. When the Public Prosecutor decides to withdraw charges, the courts only have one of two very limited consequential options. Depending on the facts, these two options are either granting an order of discharge not amounting to an acquittal popularly called 'DNAA ' or a discharge amounting to an acquittal which can be called a 'DAA'. The courts cannot turn around and insist to the public prosecutor that a charge remain. Each of them, the Judiciary and the public prosecutor have their own constitutionally-demarcated constitutional functions and both must be adjudged fairly for the exercise of their powers to the exclusion of the other.

[36] And yet, when a charge is withdrawn, the judge making the only available consequential orders is painted as corrupt, sometimes as incompetent or sometimes both. What the public fails to understand is that the person responsible for that decision is the public prosecutor and not the courts. It is often the courts that are chastised for such decisions and this erodes public confidence in the judicial system.

[38] la turut dinyatakan oleh YBhg Datuk Ahmad Terriruddin bin Mohd Salleh, Peguam Negara Malaysia dalam ucapannya di majlis yang sama seperti berikut:

12. The role of the Attorney General as the Public Prosecutor is well established and protected under Article 145 of the Constitution. The prosecutorial discretion of initiating and discontinuing criminal charges is the exercise of lawful discretion by the Public Prosecutor after a careful scrutiny of all the evidence presented by the investigation bodies and also taking into consideration the requirements of the penal laws and procedure.

13. ...

14. While discharging this constitutional obligation, the Public Prosecutor is not bound to furnish any reason whatsoever to any parties. It is therefore pertinent at this juncture to emphasize the point that, the office of the Public Prosecutor must be permitted to discharge its duties well within the confines of the Federal Constitution and any written laws without unnecessary external interference.

15. All stakeholders must therefore understand this and respect the prerogatives of the Public Prosecutor and must act fairly towards all parties without being selective towards certain matters, which will only result in sheer wastage of time and resources. This is also true in matters which appear to look frivolous or trivial, as AGC still needs to respond to every matter professionally.

[39] Sesungguhnya budi bicara yang diberikan oleh undang-undang perlu dilaksanakan mengikut prinsip undang-undang yang termaklum. Ini adalah penting bagi membolehkan tidak berlakunya penyalahgunaan proses mahkamah di samping mengelakkan daripada salah faham oleh pihak tertentu yang terlibat dalam pelaksanaan budi bicara tersebut. Mahkamah dalam

mempertimbangkan sama ada ingin memberikan perintah pelepasan tidak terjumlah kepada satu pembebasan (DNAA) atau dilepaskan yang membawa kepada pembebasan (A&D) harus mengambil kira kepentingan awam dan rasional pewujudan s 254 KTJ itu sendiri. Seksyen 254 KTJ pada hemat mahkamah bertujuan untuk memberi peluang kepada pihak pendakwaan untuk mengambil tindakan lanjut bagi melengkapkan siasatan dengan tujuan untuk mengemukakan keterangan-keterangan yang relevan untuk dipertimbangkan oleh mahkamah semasa perbicaraan kelak. Sekiranya pendakwa raya tidak diberikan ruang untuk melengkapkan siasatan yang belum selesai dan tertuduh dibebas dan dilepaskan ia adalah sesuatu yang bercanggah dengan kepentingan awam yang dipertanggungjawabkan kepada pendakwa raya untuk melindunginya.

[40] Walau bagaimanapun keterangan tersebut hendaklah pada hemat mahkamah timbul dan perlukan tindakan lanjut semasa perbicaraan. Ia tidak boleh dijadikan alasan untuk melengkapkan kertas siasatan yang sudah didapati tidak lengkap sebelum pertuduhan dikemukakan. Dalam erti kata lain s 254 KTJ bukannya wahana yang boleh digunakan oleh pihak pendakwaan bagi menutup kelemahan penyiasatan yang telah dapat dikesan sebelum pertuduhan dikemukakan. Oleh itu pendakwa raya adalah diharapkan dapat meneliti keterangan secara tuntas sebelum mengemukakan sesuatu pertuduhan di mahkamah. Adalah tidak wajar untuk satu pertuduhan dikemukakan di mahkamah kemudian setelah menyedari bahawa siasatan tersebut tidak lengkap memohon mahkamah menggunakan peruntukan s 254 KTJ untuk tertuduh diberikan pelepasan tidak terjumlah kepada satu pembebasan (DNAA). Jika ini dilakukan ia akan menghakis kepercayaan masyarakat kepada sistem pentadbiran keadilan jenayah apabila mereka melihat sesuatu pertuduhan dikemukakan dan diberhentikan pendakwaan di bawah s 254 KTJ yang berpunca daripada kurangnya penelitian kepada kertas siasatan sebelum pertuduhan dikemukakan.

[41] Adalah tidak dapat dinafikan bahawa pendakwa raya mempunyai budi bicara untuk mengemukakan pertuduhan mengendalikan perbicaraan seperti yang terjamin di bawah perkara 145(3) Perlembagaan Persekutuan dan s 376 KTJ. Namun ia harus dilaksanakan mengikut kehendak undang-undang dan bukannya atas desakan atau pengaruh atau mana-mana faktor yang bukan berdasarkan kepada undang-undang dan keterangan. Jika ini dapat dilakukan kepercayaan kepada sistem keadilan jenayah akan berada di singgahsana yang sepatutnya.

[42] Sebaliknya mahkamah pula semasa menggunakan budi bicara di bawah s 254 KTJ tidak boleh dengan sewenang-wenangnya memerintahkan tertuduh dalam kes tersebut dilepaskan yang membawa kepada pembebasan (A&D) di bawah s 254 KTJ sekiranya mendapati bahawa pihak pendakwaan mempunyai

alasan yang wajar untuk memohon penangguhan prosiding di bawah s 254 KTJ tersebut bagi melengkapkan siasatan. Ini adalah bagi membolehkan penyiasatan penuh dikemukakan untuk mahkamah membuat keputusan berdasarkan kepada prinsip undang-undang bagi menegakkan keadilan.

[43] Mahkamah ini juga berpendapat kepentingan sesuatu kes kepada kepentingan awam juga perlu diambil kira dalam menentukan sama ada kes tersebut untuk diberikan pelepasan tidak terjumlah kepada satu pembebasan (DNAA) atau dilepaskan yang membawa kepada pembebasan (A&D). Ia meliputi jenis kesalahan yang dilakukan, tempoh perbicaraan dan kerumitan sesuatu kes.

PERBEZAAN PENDAKWA RAYA TIDAK INGIN MENERUSKAN PENDAKWAAN DI BAWAH S 254 KTJ DAN PENARIKAN BALIK PERTUDUHAN

[44] Pada masa yang sama mahkamah juga perlu berhati-hati dalam meneliti peruntukan di bawah s 254 KTJ disebabkan seksyen tersebut menyatakan 'Public Prosecutor may decline to prosecute further at any stage'. Ia menunjukkan bahawa pendakwa raya boleh tidak ingin meneruskan pendakwaan. Ia perlu dibezakan dengan tindakan pendakwaan menarik balik pertuduhan (*withdrawing charge*). Jika pihak pendakwaan berhasrat untuk menarik balik kes, peruntukan di bawah s 171 KTJ perlu diberikan perhatian. Ini adalah disebabkan penarikan balik pertuduhan di bawah s 171 KTJ itu membawa kesan kepada perintah dilepaskan yang membawa kepada pembebasan (A&D). Seksyen 171 KTJ menyatakan seperti berikut:

> 171 Wtihdrawal of remaining charges on conviction on one of several charges
>
> (1) When more charges than one are made against the same person and when a conviction has been had on one or more of them, the officer conducting the prosecution may, with the consent of the Court, withdraw the remaining charge or charges, or the Court of its own accord may stay the inquiry into or trial of the charge or charges.
>
> (2) Such withdrawal or stay shall have the effect of an acquittal on such charge or charges, unless the conviction is set aside, in which case the said Court (subject to the order of the Court setting aside the conviction) may proceed with the inquiry into or trial of the charge or charges so withdrawn or not proceeded with.

[45] Mahkamah perlu jelas berkenaan perbezaan di antara tidak ingin meneruskan pendakwaan di bawah s 254 KTJ dan menarik balik pertuduhan.

PASCA PELEPASAN TIDAK TERJUMLAH KEPADA SATU PEMBEBASAN (DNAA) DI BAWAH S 254 KTJ

[46] Pihak pendakwaan sekiranya ingin meneruskan pendakwaan yang telah diberikan penangguhan prosiding di bawah s 254 KTJ ia boleh meneruskan pendakwaan dengan mematuhi s 254A KTJ yang memperuntukkan seperti berikut:

> 254A Reinstatement of trial after discharge
>
> (1) Subject to subsection (2), where an accused has been given a discharge by the Court and he is recharged for the same offence, his trial shall be reinstated and be continued as if there had been no such order given.
>
> (2) Subsection (1) shall only apply where witnesses have been called to give evidence at the trial before the order for a discharge has been given by the Court.

[47] Sekiranya pihak pendakwaan berpendapat bahawa tidak ingin meneruskan prosiding tersebut setelah diberikan pelepasan tidak terjumlah kepada satu pembebasan (DNAA) di bawah s 254 KTJ, mahkamah ini berpendapat bahawa pihak pendakwaan perlu merujuk kembali kepada mahkamah memaklumkan keputusan tidak ingin meneruskan pertuduhan dan mahkamah akan memberikan perintah yang sewajarnya terhadap tertuduh iaitu sama ada tertuduh akan dibebas dan dilepaskan daripada pertuduhan tersebut. Ini adalah disebabkan dalam satu pertuduhan jenayah seseorang itu akan mengikuti prosedur-prosedur seperti berikut:

(a) tertuduh disabitkan dan dihukum dengan sewajarnya setelah tertuduh mengaku salah;

(b) tertuduh boleh disabitkan dan dijatuhkan hukuman setelah perbicaraan penuh; dan

(c) tertuduh boleh dibebas dan dilepaskan setelah perbicaraan penuh.

(Rujuk s 173 KTJ dan s 178 hingga 182A KTJ dan *Mat v Public Prosecutor* [1963] 1 MLJ 263.)

[48] Inilah yang menjadi asas kepada sistem keadilan jenayah di negara ini. Oleh itu adalah tidak wajar apabila suatu perintah pelepasan tidak terjumlah kepada satu pembebasan (DNAA) diberikan di bawah s 254 KTJ tertuduh dibiarkan tanpa diputuskan sama ada dia telah dibebas dan dilepaskan daripada pertuduhan terhadapnya. Ini perlu dielakkan.

[49] Adalah didapati tiada peruntukan undang-undang yang meletakkan keadaan seorang tertuduh tidak dilepaskan dan tidak disabitkan. Dalam erti kata lain seseorang tertuduh tidak boleh diletakkan dalam keadaan 'gantung tidak bertali' tetapi perlu diputuskan sama ada pertuduhan jenayah

terhadapnya telah disabitkan atau dibebaskan. Setiap pertuduhan jenayah hendaklah berakhir dengan sabitan atau dibebaskan dan dilepaskan.

KEPUTUSAN DAN PERINTAH MAJISTRET DALAM KES INI

[50] Dalam kes ini pertuduhan adalah melibat kesalahan di bawah s 379 Kanun Keseksaan. Setakat ini hanya seorang saksi sahaja yang telah dipanggil oleh pihak pendakwaan. Timbalan pendakwa raya memaklumkan bahawa kes ini perlu dilepaskan tanpa dibebaskan dengan alasan untuk kajian semula kes ini ekoran daripada keterangan yang telah dibangkitkan dalam kes ini. Timbalan pendakwa raya juga berhujah bahawa pertuduhan yang dikemukakan dalam kes ini adalah tidak seberat pertuduhan di dalam kes *Vigny Alfred Raj a/l Vicetor Amratha Raja v Public Prosecutor* iaitu di bawah s 130 Kanun Keseksaan dalam kes tersebut.

[51] Sebaliknya peguam pihak perayu menyatakan bahawa salah seorang daripada tertuduh dalam kes ini adalah seorang pelajar yang masih belajar di Universiti Selangor ('UNISEL'). Peguam pihak perayu menyatakan bahawa pada awalnya tertuduh dalam kes ini pernah dituduh dalam pertuduhan yang sama iaitu fakta yang sama melalui Kes Nombor CB-83–51–03 Tahun 2022. Seterusnya pada bulan April, perayu-perayu telah dituduh dengan pertuduhan sekarang. Bagi kes yang didaftarkan tersebut pada awalnya telah ditarik balik dengan perintah pelepasan tidak terjumlah kepada satu pembebasan (DNAA) dan dituduhkan semula dengan pertuduhan sekarang. Sementara itu timbalan pendakwa raya seterusnya berhujah bahawa sekiranya perintah dilepaskan yang membawa kepada pembebasan (A&D) diberikan, pihak pendakwaan tidak lagi mempunyai peluang untuk membuat pendakwaan semula terhadap kes ini.

[52] Dalam hal ini mahkamah merujuk kepada kes *Public Prosecutor v Lee Chan Sang* [1989] 1 MLJ 224 bagi melihat apakah prinsip pertuduhan berulang terpakai jika seseorang itu dilepaskan yang membawa kepada pembebasan (A&D) tanpa melalui proses perbicaraan penuh. Mahkamah Persekutuan menyatakan seperti berikut:

> On the question of the application of the plea of *autrefois acquit* this doctrine is in fact enshrined in art 7(2) of the Federal Constitution which declares that a person who has been acquitted or convicted shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.
>
> But *autrefois acquit* means 'formerly acquitted'. It is a bar to criminal prosecution when the prisoner has already been tried for the same offence before a court of competent jurisdiction and has been acquitted. We need not cite authorities for this. The plea of *autrefois acquit* can only succeed where the accused was in jeopardy in the first proceeding, that is to say, where the merits of the prosecutor's case have been

gone into so that the decision of the court was that the evidence was insufficient to support the prosecution.

We accordingly allowed the appeal by the public prosecutor and quashed the order of the learned judge.

Oleh itu hujahan timbalan pendakwa raya bahawa dengan perintah dilepaskan yang membawa kepada pembebasan (A&D) tanpa perbicaraan penuh menghalang tertuduh daripada dituduh semula tidak dapat dipersetujui oleh mahkamah.

[53] Persoalannya dalam kes ini adakah majistret telah menggunakan budi bicara yang betul dalam mempertimbangkan perintah pelepasan tidak terjumlah kepada satu pembebasan (DNAA) dalam kes ini. Adakah mahkamah ini perlu campur tangan dalam penggunaan budi bicara majistret. Apa yang jelas daripada nota keterangan ialah pihak pendakwaan memaklumkan bahawa kajian semula akan dibuat ekoran daripada keterangan yang telah diberikan dalam kes ini. Ia mencadangkan bahawa tindakan lanjut akan diambil ekoran daripada keterangan saksi yang telah dikemukakan di mahkamah. Ia mungkin membawa natijah bahawa pendakwaan akan diteruskan terhadap perayu-perayu atau tidak akan diteruskan. Ia adalah di dalam wewenang pendakwa raya. Nota keterangan tidak menunjukkan bahawa siasatan telah lengkap bagi kes ini dan pihak pendakwaan tidak akan meneruskan pendakwaan kepada perayu-perayu. Dalam erti kata lain pihak pendakwaan masih mempunyai hasrat untuk meneruskan pendakwaan berdasarkan kepada hasil kajian yang akan dilakukan oleh pihak pendakwaan.

[54] Pada masa yang sama kes ini melibatkan pertuduhan di bawah s 379 Kanun Keseksaan, kesemua perayu telah diberikan jaminan dan kini bebas. Alasan bahawa salah seorang daripada seorang pelajar di institut pengajian tinggi pada hemat mahkamah tidak mewajarkan majistret untuk memberikan perintah dilepaskan yang membawa kepada pembebasan (A&D) dalam kes ini. Ia tidak pada hemat mahkamah tergolong dalam tindakan yang menindas perayu-perayu dalam kes ini.

[55] Mahkamah juga berpendapat perayu-perayu tidak dapat menunjukkan bahawa keputusan pendakwa raya untuk menggunakan s 254 KTJ dalam kes ini adalah salah satu penyalahgunaan proses mahkamah. Di samping itu mahkamah juga mendapati tiada keterangan dan hujahan yang menunjukkan bahawa tindakan tersebut adalah bertentangan dengan kepentingan awam.

[56] Oleh yang demikian mahkamah berpendapat keputusan majistret memberikan perintah pelepasan tidak terjumlah kepada satu pembebasan (DNAA) adalah teratur dan tidak memerlukan gangguan mahkamah ini. Akhirnya rayuan perayu-perayu adalah ditolak.

Rayuan perayu-perayu ditolak.

Dilaporkan oleh Dzulqarnain Ab Fatar